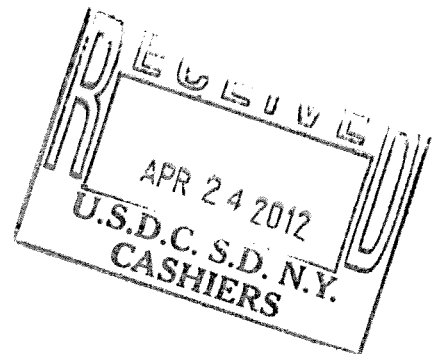


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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
JONATHAN J. POLLARD and JACQUES
SEMMELMAN,

Plaintiffs,

-against-

U.S. DEPARTMENT OF JUSTICE and U.S.
DEPARTMENT OF DEFENSE,

Defendants.
----- X

:
:
:
: **COMPLAINT FOR**
: **INJUNCTIVE RELIEF**
: **UNDER FOIA**

Nature of This Action

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking disclosure and release of agency records improperly withheld from plaintiffs by defendant U.S. Department of Justice ("DOJ") and its component the Executive Office for United States Attorneys ("EOUSA"), and by defendant U.S. Department of Defense ("DOD") and its component U.S. Department of the Navy ("DON").

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff Jonathan J. Pollard (“Pollard”) is an inmate at the Federal Correctional Institution at Butner, N.C., inmate number 09185-016.

4. Plaintiff Jacques Semmelman is an attorney for Pollard, and a partner in the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP, with offices at 101 Park Avenue, New York, NY 10178-0061. Mr. Semmelman’s principal place of business is in this District.

5. Defendant DOJ is a Department of the Executive Branch of the United States Government, and includes component EOUSA. The DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1).

6. Defendant DOD is a Department of the Executive Branch of the United States Government, and includes component DON. The DOD is an agency within the meaning of 5 U.S.C. § 552(f)(1).

The Five Documents

7. On March 4, 1987, Mr. Pollard was sentenced in the United States District Court for the District of Columbia. Prior to sentencing, four pre-sentencing documents were submitted to the court:

- (i) Declaration of Secretary of Defense Caspar W. Weinberger, dated “1986” and filed with the Court Security Officer on January 9, 1987 (the “Weinberger Declaration”) (Ex. A)

- (ii) Defendant Jonathan J. Pollard's First Memorandum in Aid of Sentencing (undated) (Ex. B)
 - (iii) Defendant Jonathan J. Pollard's Second Memorandum in Aid of Sentencing, served February 27, 1987 (Ex. C)
 - (iv) Government's Reply to Defendant's Sentencing Memorandum, served March 3, 1987 (Ex. D)
8. The minutes of the March 4, 1987 sentencing were transcribed. (Ex. E)
9. The four pre-sentencing documents, together with the pertinent pages of the minutes of the sentencing, are collectively referred to herein as the "Five Documents."
10. The Court Security Officer redacted portions of the Five Documents, and designated the redacted portions of the Five Documents as classified.
11. For reference purposes, plaintiffs have notated the annexed copies of the Five Documents with markings in the form "R__" to denote the redacted portions.

Executive Order 13526 and the Code of Federal Regulations

12. Executive Order 13526, issued December 29, 2009 and published January 5, 2010, provides, inter alia, that "[a]ll classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin," with certain exceptions. (Section 3.3(a).)
13. 32 C.F.R. Parts 2001 and 2003 have been issued pursuant to, and in implementation of, Executive Order 13526. 32 C.F.R. Section 2001.30(*I*), titled "Automatic declassification date," provides that "[n]o later than December 31 of the year that is 25 years from the date of origin, classified records determined to be permanently valuable shall be automatically declassified," with certain exceptions.

Plaintiffs' FOIA Request to DOJ

14. On June 24, 2010, plaintiffs served a FOIA request, pursuant to 5 U.S.C. § 552, on Rena Y. Kim, Chief, FOIA/PA Unit, Criminal Division, U.S. Department of Justice. (Ex. F) The request was received July 7, 2010.

15. The request sought copies of the Five Documents in unredacted form.

16. In addition, the request sought:

(1) Any and all documents and records which indicate whether or not there has been a declassification review of any portion of any of the Five Documents, or which indicate when a declassification review will occur;

(2) Any and all documents and records which reflect any declassification review of any of the Five Documents, including any determination whether or not to declassify any portion of any of the Five Documents, and the bases therefor;

(3) Any and all documents and records which specify or reference any actual or projected dates of declassification of any portion of any of the Five Documents.

17. By letter dated September 21, 2011, Ms. Kim stated that “the information you requested pertains to records maintained by the Executive Office for United States Attorneys (EOUSA), not the Criminal Division,” and that the FOIA request had been “routed ... to EOUSA for direct response to you.” The letter identified the contact person at EOUSA as Susan B. Gerson, Acting Assistant Director, FOIA/Privacy Unit. (Ex. G)

18. The September 21, 2011 letter made reference to a letter dated July 30, 2010, which had allegedly been sent by DOJ in response to the FOIA request. Plaintiffs never received such a letter.

19. Plaintiffs have not received any correspondence from EOUSA.

20. By letter dated March 5, 2012, plaintiffs wrote to Susan B. Gerson at EOUSA. The letter was received on March 15, 2012. In the letter, Plaintiffs noted that “December 31, 2011 was the December 31 of the year that is 25 years from the date of origin of the Weinberger

Declaration. Accordingly, the Weinberger Declaration is now subject to automatic declassification under Executive Order 13526 (formerly Executive Order 12958, as amended) and 32 C.F.R. § 2001.30(I).” The letter reiterated the request for an unredacted copy of the Weinberger Declaration and for all documents reflecting any declassification review of the Weinberger Declaration. (Ex. H)

21. To date, no response has been received, and no documents have been provided.

Plaintiffs’ FOIA Request to DOD

22. On August 17, 2010, plaintiffs served a FOIA request, pursuant to 5 U.S.C. § 552, on the Chief of Naval Operations, Naval Criminal Investigative Service, which is part of the DON, and in turn, part of the DOD. (Ex. I) The request was received August 24, 2010.

23. The request sought copies of the Five Documents in unredacted form.

24. In addition, the request sought:

(1) Any and all documents and records which indicate whether or not there has been a declassification review of any portion of any of the Five Documents, or which indicate when a declassification review will occur;

(2) Any and all documents and records which reflect any declassification review of any of the Five Documents, including any determination whether or not to declassify any portion of any of the Five Documents, and the bases therefor;

(3) Any and all documents and records which specify or reference any actual or projected dates of declassification of any portion of any of the Five Documents.

25. By letter dated December 2, 2010, C.L. Kline, Assistant for Information and Personnel Security, Department of the Navy, Office of the Chief of Naval Operations, acknowledged the August 17, 2010 request. Inter alia, Kline stated that “The documents were reviewed to assess if they were subject to automatic declassification per Executive Order 13256 [*sic*]. The Department of the Navy Automatic Declassification Program Manager determined that enclosure (1) is not subject to automatic declassification until March 2012.” (Ex. J)

Enclosure (1) is the Weinberger Declaration. The December 2, 2010 letter identified Sean Carney, Security Review Branch Manager (acting) as the “point of contact.”

26. By letter dated April 20, 2011, Robin W. Patterson, Head, Department of the Navy PA/FOIA Policy Branch, referenced the December 2, 2010 letter, and again stated that “[t]he documents were reviewed to assess if they were subject to automatic declassification per Executive Order 13256 [sic]. The Department of the Navy Automatic Declassification Program Manager determined that your request was not subject to automatic declassification until March 2012.” (Ex. K)

27. By letter dated March 5, 2012, plaintiffs wrote to Sean Carney at DON. (Ex. L) The letter was received March 21, 2012. With the letter, Plaintiffs included copies of the December 2, 2010 and April 20, 2011 letters, and noted that “by the terms of both letters, the Weinberger Declaration is now subject to automatic declassification.” In addition, plaintiffs noted that “December 31, 2011 was the December 31 of the year that is 25 years from the date of origin of the Weinberger Declaration. Accordingly, the Weinberger Declaration is now subject to automatic declassification under Executive Order 13526 (formerly Executive Order 12958, as amended) and 32 C.F.R. § 2001.30(l).” The letter reiterated the request for the Weinberger Declaration and for all documents reflecting any declassification review of the Weinberger Declaration.

28. To date, no response has been received, and no documents have been provided.

Defendant DOJ’s Failure to Timely Comply With Plaintiffs’ Requests

29. To date, defendant DOJ has not provided the records requested by plaintiffs in their FOIA request, notwithstanding FOIA’s requirement of an agency response within twenty working days.

30. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), plaintiffs are deemed to have exhausted their applicable administrative remedies with respect to their FOIA request to defendant DOJ.

31. Defendant DOJ has wrongfully withheld the requested records from plaintiffs, in derogation of 5 U.S.C. § 552(a)(6)(A)(i).

Defendant DOD's Failure to Timely Comply With Plaintiffs' Requests

32. To date, defendant DOD has not provided the records requested by plaintiffs in their FOIA request, notwithstanding FOIA's requirement of an agency response within twenty working days.

33. Pursuant to 5 U.S.C. § 552(a)(6)(C)(i), plaintiffs are deemed to have exhausted their applicable administrative remedies with respect to their FOIA request to defendant DOD.

34. Defendant DOD has wrongfully withheld the requested records from plaintiffs, in derogation of 5 U.S.C. § 552(a)(6)(A)(i).


Requested Relief

35. WHEREFORE, plaintiffs request the following relief:

- A. An Order directing the defendants to process the requested records in their entirety and make copies available to plaintiffs;
- B. An Order, pursuant to 28 U.S.C. § 1657(a), providing for expeditious proceedings in this action;
- C. An award to plaintiffs, pursuant to 5 U.S.C. § 552(a)(4)(E), of costs and reasonable attorneys' fees incurred in this action; and
- D. Such other and further relief as the Court may deem just and proper.

Dated: New York, NY
April 24, 2012

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